THE PUBLIC LAWYER
SEPTEMBER 8, 2004

NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

Sullivan v. State, 120 Nev. Adv. Op. No. 61 (September 3, 2004). "In this appeal, we consider whether the district court's entry of an amended judgment of conviction provided good cause to extend the one-year limitation set forth in NRS 34.726(1) for filing a timely post-conviction petition for a writ of habeas corpus. We conclude that because the claims presented in appellant's post-conviction petition were unrelated to the district court's clerical amendment, the entry of the amended judgment in this case did not provide good cause to excuse appellant's failure to raise the claims asserted in his petition within the statutory deadline."

Zabeti v. State, 120 Nev. Adv. Op. No. 60 (September 3, 2004). " Appellant Ramin Zabeti was convicted of one count of possession of a controlled substance. Zabeti contends that the district court erred in concluding that a district court judge from one county can issue a search warrant to be executed in another county. Zabeti also contends that the district court erred in denying his motion to suppress evidence discovered at his residence after the police failed to physically knock on his door before entering to conduct a search. We reject Zabeti's contentions."

Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. Adv. Op. No. 59 (September 3, 2004). "This appeal challenges the Las Vegas City Council's denial of appellant Stratosphere Resort & Casino's site development plan application to develop a

thrill ride. The Stratosphere petitioned the district court for a writ of mandamus and filed a complaint for declaratory relief.~ The district court denied the petition and dismissed the complaint. We affirm the district court's order.

In the context of governmental immunity, we have defined a 'discretionary act' as 'an act that requires a decision requiring personal deliberation and judgment.' The language used in section 19.18.050 clearly indicates a discretionary act on the part of the City Council. The ordinance uses numerous terms that require the City Council to exercise personal deliberation and judgment. For example, the City Council must ensure that the development 'contributes' to the City's long-term attractiveness and to public safety, health and general welfare, is 'compatible' with development in the area, and is not 'unsightly, undesirable or obnoxious in appearance.'

Although the Stratosphere presented evidence to rebut the opposition's concerns and testimony from individuals who supported the proposed ride, we cannot substitute our judgment for that of the City Council as to the weight of the evidence. We conclude that the kind of concerns expressed by the individuals and businesses opposed to the proposed ride are substantial and specific. Those concerns implicate the criteria that the City Council must consider under section 19.18.050 and establish a valid basis for the City Council's decision to reject the Stratosphere's site development plan. Therefore, we conclude that the district court did not abuse its discretion in denying the Stratosphere's petition and dismissing its complaint for declaratory relief."

Crawford v. State, 120 Nev. Adv. Op. No. 58 (September 3, 2004). "David Wayne Crawford was charged, tried before a jury, and found guilty of first-degree murder with use of a deadly weapon. Crawford was subsequently sentenced to two consecutive terms of life with the possibility of parole after 20 years.

Crawford appeals, arguing that the district court erred (1) in instructing the jury on a theory of liability that the State had not raised in its amended information, (2) in refusing to instruct the jury that it had to be unanimous on the burglary allegation before considering the felony-murder charge, (3) in refusing to offer his theory of defense jury instructions, and (4) in curtailing his cross-examination of a witness intended to reveal potential bias. We conclude that Crawford's arguments lack merit, with the exception of his argument that he was entitled to a jury instruction on his heat-of-passion theory of defense. We conclude that the district court's refusal to give such an instruction constitutes reversible error. Accordingly, we reverse Crawford's judgment of conviction and remand this case for a new trial."

Lobato v. State, 120 Nev. Adv. Op. No. 57 (September 3, 2004). "Appellant Kirstin Blaise Lobato appeals from a final judgment of conviction, entered following jury verdicts of guilty on separate counts of first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body. In this appeal, we consider whether the trial court erred by precluding Lobato from introducing extrinsic evidence to impeach the testimony of a witness for the State. We reverse Lobato's convictions and remand for a new trial."

Continental Ins. Co. v. Murphy, 120 Nev. Adv. Op. No. 56 (September 3, 2004). "Automobile liability insurance policies issued for delivery in Nevada must, subject to narrowly defined exceptions, provide uninsured (UM) and underinsured (UIM) motorist protection to any person insured under the policy. UM/UIM

insurance provides for the payment of first-party benefits based upon tort damages sustained in motor vehicle accidents involving uninsured or underinsured motorists. Absent a written waiver of UM/UIM coverage, the insurer must provide minimum UM/UIM coverage limits in the amount of $15,000 per person injured or killed in a single accident, and $30,000 total for two or more persons injured or killed in a single accident. We have traditionally held that UM/UIM insurance follows the insured regardless of whether the accident involved the vehicle designated in the policy. We have also held that a restriction in such coverage is void as against public policy to the extent the restriction affects the basic mandatory minimum limits mentioned above. In this appeal, we revisit the question of whether, and the extent to which, an automobile liability insurer may restrict UM/UIM coverage based upon the insured's non-occupancy of a covered vehicle.

Mr. and Mrs. Murphy are 'persons insured' under the Continental 'classic automobile policy.' Thus, the non-occupancy exclusion is void under NRS 690B.020, but only to the extent that the exclusion negates the minimum required coverage limits. Accordingly, we affirm the district court's declaratory judgment."

Desert Valley Constr. v. Hurley, 120 Nev. Adv. Op. No. 55 (September 2, 2004) "Desert Valley Construction and Employers Insurance Company of Nevada (EICN) appeal from an order denying their petition for judicial review of a workers' compensation award in favor of respondent Keith Hurley. We affirm.

Substantial evidence supports the appeals officer's determination that Hurley's use of a controlled substance was not a proximate cause of Hurley's injuries, and that the sole proximate cause was the movement of a corner of the scaffold into the hole in the floor. Accordingly, we affirm the district court's order."

Rickard v. Montgomery Ward & Co., 120 Nev. Adv. Op. No. 54 (September 2, 2004). "This appeal concerns whether the five-year prescriptive period under NRCP 41(e) is tolled for the period that a stay is imposed by a debtor's bankruptcy. Appellant David Rickard filed suit against respondent Montgomery Ward & Co., Inc., and several other parties. Thereafter, Ward filed a chapter 11 bankruptcy proceeding, which stayed Rickard's action. Eventually, Rickard obtained relief from the stay and filed a motion for trial setting with the district court. Before the trial date, Ward and the other defendants filed a motion to dismiss for Rickard's failure to bring the matter to trial within five years.

The district court ultimately dismissed the matter under NRCP 41(e), which requires involuntary dismissal of any civil case not brought to trial within five years following its commencement. Rickard appeals on the primary theory that, pursuant to 11 U.S.C. § 108(c), the five-year prescriptive period in NRCP 41(e) was tolled for the time period during which Ward was under the protection of the bankruptcy court. In the alternative, Rickard argues that principles of equity require tolling in this case based on misrepresentations made by Ward.

We conclude that 11 U.S.C. § 108(c) in itself does not toll the five-year period during the pendency of a bankruptcy proceeding. However, discerning no reason to distinguish between a court ordered stay and the automatic stay imposed by federal bankruptcy law, we now extend our rule under Boren v. City of North Las Vegas and conclude that a § 362(a)

automatic stay tolls NRCP 41(e)'s five-year prescriptive period."

Heller v. Give Nevada A Raise, 120 Nev. Adv. Op. No. 53 (September 2, 2004). "Article 19, Section 3(1) of the Nevada Constitution requires, among other things, that each document of a ballot initiative petition be accompanied by an affidavit, executed under oath by a person who signed the document, attesting that the document's signatures are genuine and that the signatories were, at the time of signing, registered voters in the county in which they reside. Respondents submitted documents comprising two initiative petitions to the Nevada Secretary of State for inclusion on the November 2004 general election ballot. The Secretary then discounted thousands of signatures in the documents for failure to comply with Section 3(1) and disqualified the initiatives from the ballot. Consequently, respondents sought relief in the district court, which declared Section 3(1)'s affidavit requirements unconstitutional under the First Amendment to the United States Constitution, and ordered the Secretary to qualify the previously disqualified signatures and place the initiatives on the ballot. We affirm because Section 3(1)'s requirement that an initiative-petition document be accompanied by a signatory's affidavit impermissibly burdens political speech by either compelling the use of only registered voters as circulators or compelling unregistered circulators to be accompanied by a registered voter who is willing to sign a petition booklet and execute an affidavit under oath authenticating that booklet's signatures."

Supreme Court Issues Amendments to Rules of Civil Procedure

The Nevada Supreme Court issued an order today revising the Nevada Rules of Civil Procedure. The rule amendments are a comprehensive revision of the rules governing civil practice in state courts. The rules are effective January 1, 2005, and govern all proceedings brought after that date and all further proceedings in actions pending on January 1. Copies of the revised rules will be available from the Supreme Court Clerk's Office for a $5.00 charge. Please contact the Clerk's Office at 775-684-1600 for further information.

Question:

Can states choose only certain types of businesses to be closed on Sundays?

Yes. Where the state determines that a day of rest would be desirable in some kinds of businesses and not in others, they are permitted to restrict only those that they deem to be necessary. Likewise, the state may decide to forbid or limit the sale of certain items (such as alcohol) on any given day, so long as the decision is justified by some secular purpose instead of a religious one. In a 1999 decision, *Harris County, Texas v. CarMax Auto Superstores, Inc.,* the 5th U.S. Circuit Court of Appeals upheld a Texas law that forbade car dealerships from being open on consecutive Saturdays and Sundays. Effectively this forced the business owners to choose one day or the other as a day of rest for their employees, though it did not dictate any particular preference as to which one should be adopted. The court denied that the law unfairly discriminated against car dealers or established any sort of preference for religion as opposed to no religion.

http://www.firstamendmentcenter.org/rel_liberty/publiclife/faqs.aspx?id=2139

EDD Showcase: The Legacy of Zubulake By Adam Cohen & David Lender

Without question, two of the most pressing areas in the law of electronic data discovery are: 1) who should pay the enormous costs associated with producing electronically stored data; and 2) spoliation charges that are becoming more commonplace as litigants seek to "litigate the litigation" as it pertains to electronic documents.

In her recent decisions in *Zubulake v. UBS Warburg LLC,* 2003 U.S. Dist. Lexis 18771 (S.D.N.Y. Oct. 22, 2003) Judge Shira Scheindlin of the Southern District of New York has offered welcome guidance.

Cost-shifting

Laura Zubulake sued UBS Warburg alleging gender discrimination, failure to promote and retaliation under federal and state law. During discovery, Zubulake sought the production of e-mails relating to her that were sent to or from certain key UBS employees, including her direct supervisors. UBS filed a motion seeking to shift the costs associated with producing those e-mails to Zubulake.

The Zubulake opinion was issued against the backdrop of a prior cost-shifting opinion out of the Southern District of New York — Rowe Entertainment Inc. v. William Morris Agency Inc., 205 F.R.D. 421 (S.D.N.Y. 2002)— which was, at the time, the leading test for determining electronic discovery cost shifting disputes. In Scheindlin's view, Rowe upset the proper presumption that the producing party should pay for producing documents in discovery and favored cost shifting too heavily.

In the first Zubulake decision, the court sought to cure this problem by revising the Rowe multi-factor test and promulgating a new seven factor test, which the court held should be applied in descending order of importance so that the top factors should be given the most weight:

1) The extent to which the request is specifically tailored to discover relevant information;
2) The availability of such information from other sources;
3) The total cost of production, compared to the amount in controversy;
4) The total cost of production, compared to the resources available to each party;
5) The relative ability of each party to control costs and its incentive to do so;
6) The importance of the issues at stake in the litigation; and
7) The relative benefits to the parties of obtaining the information.

The Zubulake court also criticized other courts that had simply applied a cost-shifting analysis to all requests for electronic discovery. Instead, the Zubulake court made clear that cost-shifting should only be considered in the context of requests for inaccessible data, such as data stored on back-up tapes. For accessible data, such as data existing in active e-mail files, the court stated that cost-shifting was never appropriate.

Lastly, the court held that a proper cost shifting analysis requires restoration of a sample of the electronic data at issue in order to provide a factual lens through which the analysis can take place.

In a subsequent decision, the Zubulake court applied its new seven factor test to the facts of the case. The court had ordered UBS to restore and produce e-mails from five of the 94 back-up tapes at issue in order to establish a factual

framework to support the cost-shifting analysis. Zubulake selected her immediate supervisor's e-mails for the five month period between her initial EEOC charge of discrimination until just before her firing by UBS.

Using an outside technical expert, and at a cost of more than $11,000, UBS was able to restore more than 8,000 e-mails, approximately 600 of which were responsive to Zubulake's document requests. Thereafter, UBS sought to shift to Zubulake the estimated costs of more than $270,000 to restore and review the remaining tapes. The court applied its new seven factor test in determining whether or not to shift the costs of production to Zubulake.

The first two Zubulake factors, which are to be given the most weight in the analysis, encompass the "marginal utility" test: "[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [producing party] search at its own expense."

In balancing these factors, the court noted that the discovery request was limited to five individuals for a narrow period of time, and that, although several of the e-mails produced from the sample were relevant, none of the e-mails provided any direct evidence of discrimination. It further found that the e-mails were not available from sources other than the back-up tapes.

Thus, the court concluded that, while restoration of the remaining back-up tapes "may be the only means for obtaining direct evidence of discrimination, the existence of that evidence is still speculative. The best that can be said is that Zubulake has demonstrated that the marginal utility is potentially high." As such, the court held that these factors weighed slightly against cost-shifting.

Cost Issues

The next three factors address cost issues. The court also weighed these factors against cost-shifting based on the facts that the case had the potential for a multi-million dollar recovery so that the projected restoration costs for the remaining tapes was not "significantly disproportionate" to the projected value of the case, and that Zubulake was an accomplished trader who had the financial ability to cover at least some of the costs of the restoration.

As for the sixth factor — the importance of the issues at stake in the litigation — the court found this factor to be neutral, given that discrimination in the workplace is not unique and that the litigation did not involve any particularly important, novel legal issues.

As for the last, least important factor – the relative benefits to the parties of obtaining the information – the court found that only this factor weighed in favor of cost-shifting because it was clear that Zubulake would benefit more than UBS from the production.

Despite the fact that all of the most important factors weighed against cost-shifting, and only the least important factor clearly weighed in favor of cost-shifting, the Zubulake court still shifted some of the costs of the production to Zubulake.

As the court explained, "[a]s noted in my earlier opinion in this case . . . a list of factors is not merely a matter of counting and adding: it is only a guide." Given that the most important marginal utility factors weighed only slightly against cost-shifting, the court found that some cost-shifting was appropriate. However, because the lion's share of the factors weighed against cost-shifting, the court shifted only 25 percent of the costs to the plaintiff.

The Zubulake decision is quickly replacing Rowe as the "gold standard" for determining

electronic discovery cost shifting disputes.

However, because its application is not a matter of simply counting the number of factors that favor cost-shifting versus those that do not, the resolution of future cost-shifting motions may be less than clear. This, of course, does not mean that litigants should simply ignore the factors. To the contrary, although litigants should be less focused on a mechanical application of the multi-factor test, the factors will likely determine how much of the costs are ultimately shifted.

In the end, litigants should focus their attention on the essence of Rule 26 — undue burden and marginal utility. If the sampling produces few, if any, relevant e-mails, cost-shifting is more likely. If the requests are not focused and the costs of production are significant, cost-shifting is again more likely.

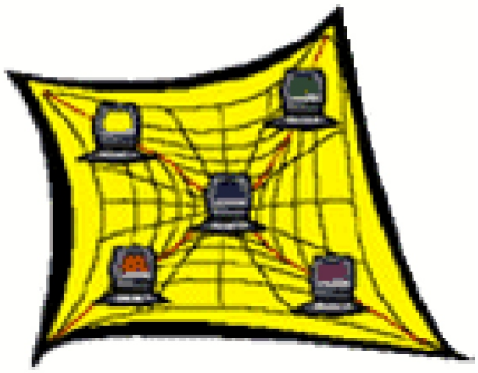
Duty to Preserve/Spoliation

Recently, the Zubulake court issued another landmark EDD decision, which, for the first time, articulated a clear statement about a litigant's duty to preserve back-up tapes.

In the context of restoring UBS backup tapes for the cost-shifting analysis, the parties discovered that certain backup tapes were missing. The court also determined that certain deleted e-mails sent after Zubulake filed her EEOC charge resided only on backup tapes.

Noting that "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should know that the evidence may be relevant to future litigation," the court held that the duty to preserve attached, at the latest, when Zubulake filed her EEOC charge in August 2001.

However, the court concluded that the duty to preserve actually arose in April 2001, nearly a year before Zubulake filed her suit against UBS, based on the facts that (i) certain UBS employees sent e-mails pertaining to Zubulake in April 2001 labeled "UBS Attorney Client Privilege," despite the fact that the substance of the e-mails was not legal and there were no lawyers copied on the e-mails, and (ii) Zubulake's supervisor admitted at his deposition that he feared litigation as early as April 2001.



Scope of Duty

The court next addressed the scope of the duty to preserve. It ruled that a corporation need not retain every electronic document once the duty to preserve is triggered and held that, "[a]s a general rule, then, a party need not preserve all backup tapes even when it reasonably anticipates litigation."

However, once the party reasonably anticipates litigation, a party has the duty to preserve all "unique, relevant evidence that might be useful to an adversary." The court made clear that the duty to preserve extends only to the key players — that is, employees who are likely to have relevant information.

The court also made clear that, although a party

must suspend its document retention policy once it reasonably anticipates litigation, the "litigation hold" does not apply, as a general rule, to inaccessible backup tapes. The one exception is where the company can identify where particular employee documents are located on backup tapes, in which case, the backup tapes containing the electronic documents for the key players must be preserved.

Welcomed Clarity

A litigant's duty to preserve as it pertains to inaccessible back-up tapes has been ambiguous at best, and the Zubulake decision offers some welcomed clarity in this regard.

For the first time, a court has clearly stated that the duty to preserve does not extend to back-up tapes, unless a corporation can reasonably determine which back-up tapes contain e-mails for the key players.

Therefore, under Zubulake, a corporation may be able to continue to recycle its back-up tapes pursuant to its document retention protocol even after litigation has commenced.

Even more importantly, the Zubulake decision confirms that a litigants' duty to search for and produce responsive documents under Rule 34 does not, in the first instance, extend to inaccessible data stored on backup tapes.

Otherwise, the court could never have concluded that a party can continue to recycle backup tapes even after litigation commences. Only when there are allegations regarding spoliation of evidence, or where a party can prove that critical evidence resides only on backup tapes, should courts consider requiring a producing party to search for and produce inaccessible data contained on backup tapes.

It is not at all clear whether the Zubulake duty to preserve decision will be embraced by other courts in the same way as its cost-shifting decision. No court has yet relied on Zubulake to hold that a litigant does not have the duty to preserve back-up tapes. However, if this decision becomes another gold standard, like the Zubulake cost-shifting decision, corporations will finally have at least some degree of clarity as to how to deal with back-up tapes in the context of litigation.

"It's awfully hard to prepare for a category four hurricane when you live with category five children."

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at http://www.ca9.uscourts.gov/ca9/neopinions.nsf)

Gilbertson v. Albright, 02-35460 (9th Cir. September 3, 2004). "May *Younger* abstention apply in an action for damages pursuant to 42 U.S.C. § 1983 that relates to a pending state proceeding, and if so, should the action be dismissed or stayed?

We conclude that *Younger* principles apply to actions at law as well as for injunctive or declaratory relief because a determination that the federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on pending state proceedings. However, federal courts should not dismiss actions where damages are at issue; rather, damages actions should be stayed until the state proceedings are completed. To this extent we recede from our statements in *Green v. City of Tucson*, 255 F.3d 1086, 1098, 1102 (9th Cir. 2001) (en banc), that direct interference is a threshold requirement, or element, of *Younger* abstention, and that *Younger* only precludes, but does not delay, the federal court action."

In re Grand jury Subpoena, No. 04-10097 (9th Cir. September 2, 2004). "Appellant John Doe was held in contempt by the district court and he appeals, challenging the district court's denial of his motion to quash a subpoena duces tecum. The government served Doe with the subpoena in conjunction with an antitrust investigation into price fixing in the Dynamic Random Access Memory chip market. We conclude that, because of the breadth of the subpoena and the government's limited knowledge of the documents sought, Doe's production of the documents would have a testimonial aspect protected by the Fifth Amendment right against self-incrimination. We therefore reverse and remand."

United States v. Gourde, No. 03-30262 (Ninth Cir. September 2, 2004). "Appellant Micah Gourde entered a conditional guilty plea to one count of possession of visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2) and 2256. As stated in the plea agreement, Gourde admitted possessing more than 100 images of child pornography on his home computer; however, Gourde conditioned his guilty plea on his right to appeal the district court's denial of his motion to suppress the images seized from his computer. He asserts that the affidavit in support of the search lacked sufficient indicia of probable cause because it contained no evidence that Gourde actually downloaded or otherwise possessed child pornography; moreover, he contends that the officers acted objectively unreasonable in relying on the allegedly unlawful warrant. We agree and reverse."

Lytle v. Carl, No. 02-16244 (9th Cir. September 1, 2004). "Defendant-Appellant Clark County School District appeals a judgment entered on a jury verdict in an action brought under 42 U.S.C. § 1983 by plaintiff-appellee Trudi Lytle, a kindergarten teacher in the District. Lytle contended at trial that the District violated her constitutional rights by retaliating against her because of an earlier action she had brought, and won, against the District. The district court denied the District's post-trial motion for a judgment as a matter of law. The district court first held that municipal liability could be imposed on the District under § 1983 based on the actions of Superintendent Dr. Brian Cram and Assistant Superintendent Dr. Edward Goldman, whom it concluded were 'final policymakers.' Second, the district court concluded that there was sufficient evidence to support a jury conclusion that Goldman engaged in retaliation and ratified retaliatory acts by other District employees. We affirm the denial of the District's motion for a judgment as a matter of law.

The District also appeals the district court's award of attorneys' fees. Lytle cross-appeals the district court's award of attorneys' fees and refusal to award taxable costs. We affirm the

district court's decisions on fees and costs."

Coons v. Secretary of the Treasury, No. 02-15665 (9th Cir. September 1, 2004). "Appellant Peter Coons was demoted by his employer, the Internal Revenue Service. He alleges that he was demoted in violation of his rights under the Rehabilitation Act for discrimination because of a disability and for requesting reasonable accommodations relating to his disability. Finally, Coons alleges that the IRS demoted him in retaliation for making disclosures protected by the Whistleblower Protection Act, in violation of the Civil Service Reform Act. We hold that the district court correctly found that Coons is not disabled within the meaning of the Rehabilitation Act and that he did not make out a prima facie case for retaliation. However, because Coons made disclosures that are protected under the Whistleblower Protection Act, we reverse in part the district court's grant of summary judgment."

United States v. You, No. 03-30420 (9th Cir. August 31, 2004). "A federal jury convicted Appellants, Chang Guo You and Mi Ae Yim, of violating 8 U.S.C. § 1324(a)(1)(A)(iii) for harboring illegal aliens. They now appeal their convictions and sentences. You argues that the court erred in (1) denying his motion for a retrial on double jeopardy grounds and (2) declining to grant him a downward departure during sentencing pursuant to U.S.S.G. § 5K2.0 or § 5K2.13. You and Yim both contend that the district court erred in instructing the jury. Finally, Yim argues that the district court erred in its determination that Yim failed to show that the government purposefully discriminated in making its peremptory challenges. We disagree with each contention and affirm the district court."

Johnson v. City of Sequim, No. 03-35057 (9th Cir. August 31, 2004). "In this section 1983 action Anthony L. Johnson appeals the grant of summary judgment predicated on qualified immunity for his arrest by the City of Sequim Police Chief Byron Nelson for a violation of Washington's Privacy Act, Wash. Rev. Code § 9.73.030. Because it was clearly established under Washington law at the time of the arrest that recording a police officer in the performance of his public duties was not a violation of the Privacy Act and it was unreasonable for Chief Nelson to believe otherwise, we hold that the Chief is not entitled to qualified immunity. Moreover, because Chief Nelson could not have had any reasonable expectation of privacy in the communications by others over the police radio dispatch system, which was the basis for his Privacy Act arrest of Johnson, the arrest violated Johnson's Fourth Amendment right to be free of arrest without probable cause. And because Johnson submitted evidence supporting his claim of *Monell* liability against the City, summary judgment was not warranted on any ground relied upon by the district court. We therefore reverse and remand for further proceedings."

United States v. Castro, No. 03-50444 (9th Cir. August 27, 2004). "Juan Benito Castro appeals, asserting both that there was a fatal variance between the indictment and the facts presented at trial and that his re-sentencing was unconstitutional because it was based on facts that were found by the district judge, not a jury. We reject his fatal variance claim and affirm his conviction in a separate memorandum disposition filed concurrently herewith.

In *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004), we held that *Blakely v. Washington*, 124 S. Ct. 2531 (2004), applied to the United States Sentencing Guidelines and, thus, the imposition of an enhanced sentence on the basis of judge-found facts violates the Sixth Amendment. After we decided *Ameline*,

but prior to the submission of this case, the Supreme Court granted certiorari in *United States v. Booker*, 375 F,3d 508 (7th Cir. 2004), *cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-104), and *United States v. Fanfan*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, 73 U.S.L.W. 3074 (U.S. Aug. 2, 2004) (No. 04-105). Both of these cases deal with the same sentencing issues that we decided in *Ameline*.

As we recognized in *Ameline*, 'the *Blakely* court worked a sea change in the body of sentencing law.' 376 F.3d at 973. Whatever the outcome of the Supreme Court proceedings in *Booker* and *Fanfan*, those decisions will likely have a profound impact upon our disposition of sentencing issues in direct criminal appeals and will certainly affect the continued vitality of *Ameline*. Accordingly, in a case in which the defendant appeals both his conviction and his sentence, if we decide to affirm the conviction and if the sentence imposed implicates *Blakely* or *Ameline*, we would ordinarily withhold our decision until the Court decides *Booker* and *Fanfan*. *See, e.g., Comer v. Stewart*, 312 F.3d 1157, 1158 (9th Cir. 2002) (holding proceedings in abeyance pending our decision in a relevant case). Similarly, if we have already issued our decision in such a case, but have not yet issued the mandate, we would ordinarily stay further proceedings. *See, e.g., Pizzuto v. Arave*, 280 F.3d 1217 (9th Cir. 2002) (staying the mandate pending the Supreme Court's decision in a related case).

Here, however, circumstances prompt us to act on the sentencing issues at this point, instead of staying proceedings pending the Court's decisions in *Booker* and *Fanfan*. Had Castro's sentence been based only on the facts that were found by the jury and not on those found by the district judge, he would already have completed serving his sentence. Where the portion of the sentence that is clearly unaffected by *Blakely* and *Ameline* has expired or will expire shortly, we deem it appropriate to remand the case to the district court for whatever action it determines to be proper under the circumstances. Among the options available to the district court, within the exercise of its discretion, would be to reconsider its sentence or to stay further proceedings pending the outcome of *Booker* and *Fanfan*, with or without granting bail to the defendant."

Alpha Energy Savers, Inc. v. Hansen, No. 03-35142 (9th Cir. August 27, 2004). "This case requires us to consider the scope of constitutional protection afforded to public contractors who serve as witnesses in judicial and administrative proceedings. Robert Obrist testified at a grievance hearing, and filed an affidavit and agreed to be listed as a witness in a federal discrimination lawsuit, on behalf of a former employee of Multnomah County. The County and two of its employees, Diane Hansen and Judy Swendsen, allegedly retaliated against Obrist by manipulating the County's contracting procedures in order to deny work to his company, Alpha Energy Savers, Inc. The district court granted summary judgment for the defendants on the ground that Obrist's expressive conduct did not touch upon a matter of public concern and, thus, could not support a First Amendment retaliation claim under 42 U.S.C. § 1983. We reverse that ruling against Obrist and Alpha. We also reverse the district court's grant of summary judgment on the plaintiffs' supplemental Oregon state law claim of intentional interference with contractual relations."

Chavis v. LeMarque, No. 01-17072 (August 27, 2004). "In 1991, Reginald Chavis was convicted of attempted first degree murder with the use of a weapon in Sacramento County Superior Court. He unsuccessfully challenged

his conviction on direct appeal in California state courts and then filed two rounds of state habeas petitions. All of Chavis's state petitions were denied, and he filed a federal habeas petition on August 30, 2000. The issue before us is whether
Chavis's federal petition was filed within the one-year statute of limitations provided by the Antiterrorism and Effective Death Penalty Act. The district court dismissed the petition as untimely. We reverse.

Save Our Sonoran, Inc. v. Flowers, No. 02-16156 (9th Cir. August 26, 2004). "In this appeal, we consider the management of the waterways in Arizona's Sonoran desert. This, of course, inevitably brings to mind the exchange between Claude Rains and Humphrey Bogart in Casablanca (Warner Bros. 1942), which aptly distills this dispute to its essence:

> Captain Renault: What in heaven's name brought
> you to Casablanca?
> Rick: My health. I came to Casablanca for the
> waters.
> Captain Renault: The waters? What waters? We're
> in the desert.
> Rick: I was misinformed.

In our case, it was not Rick Blaine, but the United States Army Corps of Engineers that came to the desert for the waters. An aspiring desert developer, 56th & Lone Mountain, L.L.C., sought and obtained a Clean Water Act dredge and fill permit from the Corps for the construction of a gated community near Phoenix. The permit was required, and the Corps' jurisdiction invoked, because water courses through the washes and arroyos of the arid development site during periods of heavy rain. The desert washes are considered navigable waters, and therefore fall under the jurisdiction of the federal government.

At some point, a non-profit environmental organization, Save Our Sonoran ("SOS"), became aware of the project. It was not, shall we say, the beginning of a beautiful friendship.
SOS eventually filed this action against the Corps and Lone Mountain, alleging violations of the National Environmental Policy Act and the CWA. The district court issued a preliminary injunction suspending development during the pendency of the litigation. Lone Mountain
appealed. We affirm."

In re North, No. 03-15629 (9th Cir. August 25, 2004). "Gerald North, an attorney, appeals an order of the District Court for the District of Arizona upholding his prior suspension from the practice of law before that court. We hold: (1) that the rule generally barring jurisdiction over denials of applications to district court bars does not deprive us of jurisdiction to consider North's appeal; (2) that North's claim that the district court followed improper procedures in suspending him from its own bar on the basis of his suspension from the State Bar of Arizona is moot because North's suspension from the state bar has expired and does not fall into the category of cases capable of repetition yet evading review; (3) North's claim that District of Arizona Local Rule 1.5(a) is generally invalid because it could permit insufficient review of state court suspension procedures is not properly before us; and (4) that, although the question is not moot, North has not shown that Rule 1.5(a) violates precedent governing membership requirements for district court bars. We therefore affirm the district court."

United States v. Wilmore, No. 03-10297 (9th Cir. August 25, 2004). "Earnest Wilmore was convicted of one count of being a felon in possession of a firearm, in violation of 18

U.S.C. §§ 922(g)(1) and 924(a)(2) (2000). Wilmore contends that his Sixth Amendment rights were violated when the district court restricted his cross-examination of a government witness. We agree, and reverse and remand for a new trial."

United States v. Howard, No. 02-16228 (9th Cir. August 25, 2004). "When Jeffrey Dean Howard pled guilty in federal district court, he was under the influence of a prescribed narcotic painkiller due to severe leg injuries from a motorcycle accident and consequently, he claims, did not fully understand the nature and consequences of his plea agreement. Howard appeals the district court's denial of his 28 U.S.C. § 2255 habeas petition, arguing that his counsel's performance was constitutionally ineffective in permitting him, while incompetent, to acquiesce in a plea agreement he had seen for the first time just before he agreed to plead guilty. Because there is no dispute that Howard was taking powerful narcotic drugs that could have dulled his mental faculties and because he has alleged specific, credible facts in support of his ineffective assistance of counsel claim, we conclude that the district court should have permitted Howard to develop these claims more fully in an evidentiary hearing. We have jurisdiction under 28 U.S.C. § 2253, and we reverse and remand."

United States v. Karaouni, No. 03-10327 (9th Cir. August 24, 2004). "After a two-day trial, Ali Abdulatif Karaouni was convicted of violating 18 U.S.C. § 911 by falsely claiming to be a United States citizen when he checked a box on an Immigration and Naturalization Service (INS) I-9 Employment Eligibility Verification Form next to the following printed statement: 'I attest, under penalty of perjury, that I am . . . [a] citizen or national of the United States.'

On appeal, Karaouni contends that the evidence was insufficient to support his conviction because no rational juror could find beyond a reasonable doubt that, by checking the box on the I-9 Form, he made a claim to be a U.S. citizen as opposed to a U.S. national. Because a claim to be a U.S. national, even if false, does not constitute a violation of 18 U.S.C. § 911, we reverse the district court's judgment and vacate Karaouni's conviction and sentence."

United States v. Boylan, No. 03-56681 (9th Cir. August 24, 2004). "Sandra V. Boylan, et al. appeal the judgment of the district court denying them Article III standing to enter claims against the funds in this forfeiture proceeding brought by the United States. Holding that they do in fact have a cognizable legal interest in the property, we reverse the judgment against them and remand for proceedings in conformity with this opinion.

Bringing a civil action for forfeiture, the government alleged a fraud committed on the 25 Appellants and 53 others by one James Carroll Sexton. The facts of the fraud alleged by the government are undisputed by the Appellants, and for the purposes of this appeal we assume them to be true. In the course of 1998 and 1999, Sexton persuaded a number of persons, including the Appellants, to send him money that he would invest on their behalf. Contrary to his representations, he shuffled the money so collected through various bank accounts in Liechtenstein, which he controlled. In these acts, Sexton committed mail fraud, wire fraud and money laundering."

United States v. Marks, No. 03-30464 (9th Cir. August 20, 2004). "The government appeals the dismissal with prejudice of an indictment charging Thomas Stanko Marks with possession of firearms and ammunition by a felon in violation of 18 U.S.C. § 922(g)(1). The district court held that Marks' predicate state conviction was unconstitutional, because he received ineffective assistance of counsel due

to his attorney's actual conflict of interest in jointly representing both defendants. SinceWashington law forbids the use of an unconstitutional conviction as a predicate for subsequent criminal prosecutions, the court dismissed the indictment, citing 18 U.S.C. § 921(a)(20), which provides that state law determines what constitutes a conviction for the purposes of § 922(g)(1). This court has jurisdiction under 28 U.S.C. § 1291. We conclude that, regardless of any alleged constitutional defect in Marks' Washington conviction, his felony conviction qualifies as a predicate conviction for the purposes of § 922(g)(1). We therefore reverse the decision of the district court."

United States v. Tarallo, No. 02-50252 (9th Cir. August 20, 2004). "Defendant Aldo Tarallo appeals his convictions on six counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b-5; and four counts of mail fraud, in violation of 18 U.S.C. § 1341. We reverse his convictions with respect to three vicarious liability counts for lack of evidence. In affirming the remaining seven counts, we hold that a defendant may commit securities fraud 'willfully' in violation of 15 U.S.C. § 78ff and 17 C.F.R. § 240.10b-5 even if the defendant did not know at the time of the acts that the conduct violated the law. We further hold that a defendant may commit securities fraud 'willfully' by intentionally acting with reckless disregard for the truth of material misleading statements. Finally, we hold that 15 U.S.C. § 78ff is not facially unconstitutional as a violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)."

United States v. Patterson, No. 00-30306 (9th Cir. August 20, 2004). "Toby C. Patterson was convicted of one count of manufacturing marijuana in violation of 21 U.S.C. § 841 and sentenced to 188 months' imprisonment. In a prior opinion, we affirmed Patterson's sentence and conviction. *United States v. Patterson*, 292 F.3d 615 (9th Cir. 2002). We held that jeopardy did not attach when the district court accepted Patterson's guilty plea and that the court accordingly did not err in vacating Patterson's plea and proceeding to trial over his objection. *Id.* at 622-25. We subsequently held en banc, however, that the district court does not have the authority to vacate a defendant's plea when the court has accepted the plea, but deferred a decision regarding whether to accept the plea agreement. *Ellis v. United States Dist. Court*, 356 F.3d 1198 (9th Cir. 2004) (en banc). Because the en banc opinion in *Ellis* undercut the rationale of our prior opinion, we granted Patterson's petition for panel rehearing and withdrew our prior opinion. *United States v. Patterson*, 359 F.3d 1190 (9th Cir. 2004). We now hold that the district court erred in vacating Patterson's guilty plea. We therefore vacate his sentence and remand with instructions to reinstate the original plea and sentence Patterson in accordance with that plea."

Prescod v. AMR, Inc., No. 02-55097 (9th Cir. August 19, 2004). "For most travelers affected by air carriers' misplacement of luggage, the inconvenience is a fleeting nuisance. In the case before us, however, the district court found that the defendant Airlines' failure to ensure that Caroline Neischer's bag remained in her possession was a substantial cause of Neischer's death nine days after the bag's confiscation, because the bag contained 'a life-sustaining breathing device and related medicine.'" The defendants appeal this determination, challenging whether Neischer's death resulted from an 'accident' as defined by the Warsaw Convention, and, if so, whether there was 'willful misconduct.'"

Rhodes v. Robinson, No. 03-15335 (9th Cir. August 19, 2004). "We must resolve a legal quandary that only Joseph Heller, the author of

Catch-22, could have imagined: Do the exhaustive efforts of an incarcerated prisoner to remedy myriad violations of his First Amendment rights demonstrate that his First Amendment rights were not violated at all?

The district court's further holding that Rhodes's filing *this very lawsuit* somehow precludes relief on the retaliation claim he therein presents goes even further afield. Indeed, were we to adopt such a theory, prisoner civil rights plaintiffs would be stuck in an even more vicious Catch-22. The only way for an inmate to obtain relief from retaliatory conduct would be to file a federal lawsuit; yet as soon he or she does so, it would become clear that he or she cannot adequately state a claim for relief. Like its fictional counterpart, this catch exudes an 'elliptical precision about its perfect pairs of parts that [i]s both graceful and shocking.' *Catch-22* at 47. Unlike Colonel Cathcart, however, we are unwilling to indulge a rule that 'would result in the anomaly of protecting only those individuals who remain out of court."

Randolph v. California, No. 03-16064 (9th Cir. August 19, 2004). "Petitioner Willis Randolph appeals the district court's denial of his petition for a writ of habeas corpus challenging his 1986 state court conviction for murder. We hold that if the State places a cooperating informant in a jail cell with a defendant whose right to counsel has attached, and if the informant then makes a successful effort to stimulate a conversation with the defendant about the crime charged, the State thereby violates the defendant's Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201 (1964). Because the district court failed to make proper factual findings, we vacate the district court's denial of Randolph's *Massiah* claim and remand for factfinding. We do not decide the part of Randolph's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that depends on the district court's finding of fact necessary for the *Massiah* claim. We affirm the district court's denial of Randolph's other claims."

United States v. Benitez, No. 00-50181 (9th Cir. August 19, 2004). "Pursuant to the Supreme Court's decision in this case, *United States v. Dominguez Benitez*, No. 03- 167, ___ U.S. ___, 124 S. Ct. 2333 (2004), overruling our decision, *United States v. Benitez*, 310 F.3d 1221 (9th Cir. 2003), we now AFFIRM appellant Carlos Dominguez Benitez's conviction. Our decision does not affect Benitez's right to file a petition for habeas corpus pursuant to 28 U.S.C. § 2255."

Beene v. Terhune, No. 03-15678 (9th Cir. August 19, 2004). "Robert Eugene Beene brings this 42 U.S.C. § 1983 action, alleging that he was erroneously required to register as a sex offender under California Penal Code § 290 for an offense he committed as a juvenile in Arkansas in 1972. Beene alleged in his complaint that defendants/appellees James Nielson, Chairman of the Board of Prison Terms; Pat Davis, his parole hearing officer; Roger Schaufel, Deputy Commissioner of the Board of Prison Terms; and J.M. Widener, his parole officer violated § 290 and his right to equal protection and due process by revoking his parole for failing to register. We review the district court's grant of summary judgment de novo and we affirm."

Couer D'Alene Tribe of Idaho v. Hammond, No. 02-35965 (9th Cir. August 19, 2004). "We must decide whether Indian tribes have sovereign immunity from an Idaho state tax on motor fuel delivered by non-tribal distributors to tribally-owned gas stations for sale on Indian reservations. The Supreme Court of Idaho ruled in 2001 that the incidence of essentially the same tax fell impermissibly on the Indian tribes, and that Congress had not through the Hayden-Cartwright Act authorized states to

abrogate the Indian tribes' sovereign immunity from taxation on the fuel sold on their reservations. After this state court ruling became final, the Idaho legislature attempted to modify the impact of the state court ruling by amending the tax law to provide expressly that the incidence of the Idaho state tax falls on the non-tribal distributors, not on the tribes who owned the retail gas stations located on the tribes' reservations. The tribes sued the Idaho State Tax Commissioners in federal district court to enjoin them from collecting the motor fuels tax. Notwithstanding the legislative amendment, the district court reached the same conclusion that the Supreme Court of Idaho had reached, that the incidence of the tax fell on the tribes and that sovereign immunity had not been waived. The district court accordingly granted summary judgment to the tribes and enjoined the Commissioners from enforcing the Idaho Motor Fuel Tax on 'motor fuel delivered to, received by, or sold by Tribal or Indian owned retail gasoline stations in the Coeur d'Alene, Nez Perce, or Shoshone Bannock Reservations.'

The Commissioners appeal the district court's decision and present two issues: Does the legal incidence of the tax fall impermissibly on Indian retailers, or permissibly on non-tribal distributors? If the incidence falls on the Indians, does the Hayden-Cartwright Act, which authorizes states to tax motor fuel sales on 'United States military or other reservations,' apply to Indian reservations? On the second of these issues, we must address the tribes' argument on cross-appeal that because the Supreme Court of Idaho has previously ruled on the applicability of the Hayden-Cartwright Act in this context, the state is barred from re-litigating the matter. We have jurisdiction under 28 U.S.C. § 1291, and we affirm."

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., No. 03-55894 (9th Cir. August 19, 2004). "This appeal presents the question of whether distributors of peer-to-peer file-sharing computer networking software may be held contributorily or vicariously liable for copyright infringements by users. Under the circumstances presented by this case, we conclude that the defendants are not liable for contributory and vicarious copyright infringement and affirm the district court's partial grant of summary judgment."

United States v. Kincade, No. 02-50380 (9th Cir. August 18, 2004) (*en banc*). "We must decide whether the Fourth Amendment permits compulsory DNA profiling of certain conditionally-released federal offenders in the absence of individualized suspicion that they have committed additional crimes.

While not precluding the possibility that the federal DNA Act could satisfy a special needs analysis, we today reaffirm the continuing vitality of *Rise*—and hold that its reliance on a totality of the circumstances analysis to uphold compulsory DNA profiling of convicted offenders both comports with the Supreme Court's recent precedents and resolves this appeal in concert with the requirements of the Fourth Amendment."

Wong v. Regents of the Univ. of California, No. 01-17432 (9th Cir. August 18, 2004). "Andrew H.K. Wong alleges that the University of California discriminated against him in violation of the Americans with Disabilities Act and the when it denied his request for learning disability accommodations and subsequently dismissed him for failure to meet the academic requirements of the medical school at the University's Davis campus. The district court granted the University's motion for summary judgment, concluding that Wong failed to present a triable issue of material fact as to whether he was 'disabled' and thus legally

entitled to special accommodations under those Acts. Wong's appeal thus requires us to consider the meaning of 'disabled' under the Acts. More specifically, it presents a question of whether a person who has achieved considerable academic success, beyond the attainment of most people or of the average person, can nonetheless be found to be 'substantially limited' in reading and learning, and thus be entitled to claim the protections afforded under the Acts to a 'disabled' person."

Brown v. Pamateer, No. 03-35618 (9th Cir August 17, 2004). "Petitioner Gilbert C. Brown alleges that his constitutional rights were violated when a statute, enacted after the commission of his crimes, was applied by the Oregon State Board of Parole and Post-Prison Supervision to postpone his parole release date. He contends that this violation of the Ex Post Facto Clause constitutes a constitutional injury that compels reversal of the district court's denial of his petition for habeas corpus. We agree."

Thomas v. City of Beaverton, No. 03-35120 (9th Cir. August 16, 2004). "We hold that Thomas has offered sufficient evidence to create a genuine issue of material fact as to whether her refusal to facilitate Miller's allegedly unlawful retaliatory treatment of Perry in the hiring process constituted expressive conduct on a matter of public concern. For similar reasons, we hold that Thomas has offered sufficient evidence that she engaged in an activity protected under Title VII by opposing retaliation against Perry on account of Perry's own Title VII suit. Therefore, we reverse the grant of summary judgment on her First Amendment and Title VII retaliation claims. We affirm summary judgment, however, on her equal protection claim, because there is insufficient evidence of racial animus, as well as on her remaining claims."

Hubbart v. Knapp, No. 03-16877 (9th Cir. August 13, 2004). "Christopher Hubbart claims that his commitment under California's Sexually Violent Predator Act, Cal. Welf. & Inst. Code § 6600, et seq., violates federal due process and equal protection, and he seeks habeas corpus relief. Hubbart was the first person confined under this latest California civil commitment statute, and his case follows an evolution of state efforts, civil and criminal, to contain and rehabilitate recidivist sex offenders. The California courts have rejected Hubbart's facial challenge to the SVPA and upheld its specific application in his case. On August 23, 2003, the district court denied Hubbart's federal habeas corpus petition. We affirm."

Berry v. Baca, No. 03-56000 (9th Cir. August 13, 2004). "Anthony Hart, Rodney Berry, and Roger Mortimer each sue Los Angeles County Sheriff Leroy Baca, in his official capacity, for pursuing a policy of deliberate indifference to their constitutional rights that resulted in unlawful periods of over detention in the Los Angeles County jail. In each case, the plaintiff was detained for a period ranging from twenty six to twenty- nine hours after the court had authorized his release from jail. Their cases were consolidated before the district court.

On May 29, 2003, the district court granted Baca's motion for summary judgment. The court based its holding on the recently decided Ninth Circuit case, *Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir.), *cert. denied*, 124 S. Ct. 925 (2003), which the district court held controlled because it found *Brass* and these consolidated cases 'rest upon nearly identical grounds.' Because we conclude that *Brass* is distinguishable, and that the plaintiffs in this case have raised a genuine issue of material fact with regard to the existence of a county policy of deliberate

indifference to the constitutional rights of the plaintiffs, we reverse the grant of summary judgment and remand to the district court for further proceedings."

Henderson v. Terhune, No. 02-17224(9th Cir. August 12, 2004). "Philip Henderson, a Native American inmate in the California state prison system, appeals the district court's judgment in favor of prison officials in his 42 U.S.C. § 1983 action. Henderson alleges that the California Department of Corrections' hair length regulation infringes upon the free exercise of his Native American religious beliefs in violation of the First Amendment. We affirm the district court's judgment because the regulation at issue is reasonably related to legitimate penological interests.

Henderson also appeals the district court's conclusion that he cannot state an actionable claim under the American Indian Religious Freedom Act of 1978 ("AIRFA"), 42 U.S.C. § 1996. We find that the AIRFA is simply a policy statement and does not create a cause of action or any judicially enforceable individual rights. Accordingly, we affirm the district court's conclusion."

Students for a Conservative America v. Greenwood, No. 03-15199 (9th Cir. August 11, 2004). "Unsuccessful candidates for student government positions at the University of California, Santa Cruz and a student organization, of which the candidates are members, challenged specific provisions of the University's election code on First Amendment grounds. The district court held that it lacked the authority to order a new election because the defendants, various University officials, were entitled to Eleventh Amendment immunity. The district court dismissed the remaining claims as moot because the defendants had removed the challenged provisions from the election code. We affirm."

Poulos v. Ceasars World, Inc., No. 02-16604 (9th Cir. August 10, 2004). "This permissive interlocutory appeal comes to us from a denial of class certification in a lawsuit involving the gaming industry. Proposed class representatives, William H. Poulos, Brenda McElmore, and Larry Schreier ("Class Representatives"), challenge an alleged 'scheme to defraud patrons of gambling casinos' by a group of over sixty gaming machine manufacturers and the casino and cruise ship operators that use the machines. The proposed classes encompass nearly everyone who has played video poker or electronic slot machines within the last fifteen years. We take this opportunity to clarify the extent to which a class action plaintiff must establish individualized reliance to meet the causation requirement of a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim predicated on mail fraud—an issue that bears heavily on a plaintiff's ability to meet the predominance and superiority requirements of class certification under Federal Rule of Civil Procedure 23(b)(3). We conclude that the Class Representatives, like all plaintiffs asserting civil RICO claims, must prove individualized reliance where that proof is otherwise necessary to establish actual or proximate causation. Because the district court did not abuse its discretion in determining that individualized causation issues would predominate in this case, and no presumption of reliance applies, we affirm the denial of class certification."

Felix v. Mayle, No. 02-16614 (9th Cir. August 9, 2004). "This case, in which state prisoner Jacoby Lee Felix seeks a federal writ of habeas corpus to overturn his state conviction, presents an important question of federal civil procedure that has divided other circuits. The question is this: when a habeas petitioner challenging a

state conviction amends his federal petition to include a new claim, does the amendment relate back to the date of filing of his petition and thus avoid the one-year limitation of the Antiterrorism and Effective Death Penalty Act), 28 U.S.C. § 2244(d)(1)? That question in turn depends upon the interpretation of Federal Rule of Civil Procedure 15(c)(2), which provides that an amendment relates back to the date of the original pleading when 'the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading.' We join the Seventh Circuit in concluding that a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction. The claim thus relates back under Rule 15(c)(2). We accordingly reverse the ruling of the district court holding Felix's claim of coerced confession to be time-barred."

United States v. Gemetera, No. 03-10103 (9th Cir. August 9, 2004). "We must decide the legality of a supervised release condition that requires a convicted mail thief to spend a day standing outside a post office wearing a signboard stating, 'I stole mail. This is my punishment.'

Accordingly, we hold that the condition imposed upon Gementera reasonably related to the legitimate statutory objective of rehabilitation. In so holding, we are careful not to articulate a principle broader than that presented by the facts of this case. With care and specificity, the district court outlined a sensible logic underlying its conclusion that a set of conditions, including the signboard provision, but also including reintegrative provisions, would better promote this defendant's rehabilitation and amendment of life than would a lengthier term of incarceration."

Smith v. Salish Kootenai College, No. 03-35306 (9th Cir. August 6, 2004). "We consider an issue of increasing importance to the federal courts and to non-tribal members who live or work in or around Native American reservations: When does an Indian tribe's civil jurisdiction extend to non-tribal members? We must decide whether the Confederated Salish and Kootenai Tribes of the Flathead Reservation had the adjudicative authority to exercise civil subject-matter jurisdiction over a non-tribal member in a tort dispute that arose from a traffic accident on a public highway on the reservation.

We conclude that, because Smith is a non-member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the tribal courts could only exercise civil jurisdiction over Smith if one of the two *Montana* exceptions applies. Because neither exception applies, we hold that the tribal court lacked civil jurisdiction over Smith's claims against SKC. We reverse and remand the case for the district court to consider Smith's claims on their merits."

American Civil Liberties Union of Nevada v. Heller, No. 01-15462 (9th Cir. August 6, 2004). "We are asked in this case to rule on the constitutionality of a Nevada statute that requires certain groups or entities publishing 'any material or information relating to an election, candidate or any question on a ballot' to reveal *on the publication* the names and addresses of the publications' financial sponsors. After the district court found no constitutional infirmities, we remanded for a determination of plaintiffs' standing. Now satisfied that standing has been established, we hold that the statutory provision is facially unconstitutional because it violates the Free Speech Clause of the First Amendment, as explicated by *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)."

Demert v. Arpaio, No. 03-15698 (9th Cir. August 6, 2004). "The Fourteenth Amendment prohibits punishment of pretrial detainees. Applying this principle, the district court preliminarily enjoined the use of world-wide web cameras ('webcams') in the Maricopa County Madison Street Jail. We must decide whether the district court abused its discretion in granting the plaintiffs' motion for a preliminary injunction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

When Maricopa County Sheriff Joe Arpaio announced the installation of webcams in the Madison Street Jail, he proclaimed '[w]e get people booked in for murder all the way down to prostitution. . . . When those johns are arrested, they can wave to their wives on the camera.' Sheriff Arpaio also explained that his policy deterred crime and opened up the jails to public scrutiny: 'The public has the right to know what's going on in our jails. . . . And I believe that they act as a tool to deter crime. We hope that the *only* visit people make to our jail is a virtual visit." In July 2000, four webcams began streaming live images of pretrial detainees to internet users around the world."

Custer v. Hill, No. 02-36038 (9th Cir. August 6, 2004). "Jimmie Lee Custer appeals the District Court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus challenging his conviction for sodomy in the first degree. Custer's claim that the Oregon court violated his rights under the Fifth Amendment fails. Custer was not subjected to double jeopardy when Oregon prosecuted Custer for engaging in sodomy with his stepson between November 1, 1986 and June 19, 1987, after Custer was acquitted at a prior trial charging him with engaging in sodomy on June 20, 1987, because Custer was tried for *different offenses* that occurred at *different times*. Custer's petition that his counsel was ineffective at trial for abandoning a double jeopardy claim and failing to raise it on appeal fails because Custer did not fairly present the ineffective assistance of counsel claim to the Oregon Supreme Court, and no cause exists to excuse the procedural default."

United States v. Combs, No. 02-50485 (9th Cir. August 5, 2004). "Dale Roy Combs appeals from the district court's judgment of conviction and sentence imposed after a jury found him guilty as charged in a two-count indictment for manufacturing and distributing more than 500 grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1). Because we conclude that the transfer of trace, unuseable amounts of methamphetamine for the purpose of disposal is insufficient to support a conviction for 'distribution' under Section 841(a)(1), and that improper prosecutorial questioning and vouching prejudiced Combs's right to a fair trial, we reverse, vacate, and remand for a new trial on solely the manufacturing count."

Brewer v. Hall, No. 03-55974 (9th Cir. August 4, 2004). "Ronald Brewer appeals from the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Brewer argues that California Jury Instruction ("CALJIC") 17.41.1 violated his constitutional rights. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and there is no clearly established federal law determined by the Supreme Court that indicates that the use of CALJIC 17.41.1 was constitutionally improper in Brewer's case. We therefore agree with the district court that the California Court of Appeal did not unreasonably apply clearly established federal law in rejecting Brewer's challenge to his conviction."

OTHER CASES

Prince v. Board of Examiners, No. 03-3524 (8th Cir. August 17, 2004). In an appeal of the suspension of a license to practice psychology, plaintiff's claims raised in his federal civil rights action were inextricably intertwined with a state court judgment and this action was barred by the Rooker-Feldman doctrine.
http://caselaw.lp.findlaw.com/data2/circs/8th/033524p.pdf

Doe v. Little Rock School, No. 03-3268 (8th Cir. August 17, 2004). School district's practice of subjecting secondary school students to random, suspicionless searches of their persons and belonging is an unconstitutional violation of the students' Fourth Amendment rights because the searches unreasonably invade the students' legitimate expectations of privacy.
http://caselaw.lp.findlaw.com/data2/circs/8th/033268p.pdf

Givens v. Alabama Dep't of Corrections, No. 03-14086 (11th Cir. August 18, 2004). Plaintiff-inmate's challenge that defendant's policy, which prohibits inmates from receiving the interest from work release wages, constitutes an unlawful taking, is dismissed where Alabama has not created a property interest for its inmates in the interest that accrues on their accounts.
http://caselaw.lp.findlaw.com/data2/circs/11th/0314086p.pdf

American Pelagic Fishing Co. v. United States , No. 03-5101(Fed. Cir. August 16, 2004). Judgment in favor of plaintiff's claim, which alleged that Federal Appropriations Acts revoking its fishing permits effected a temporary taking, is reversed where plaintiff did not suffer the taking of a property interest that is legally cognizable under the Fifth Amendment.
http://laws.lp.findlaw.com/fed/03-5101.doc

Pierce v. Sullivan West Central School Dist,. No. 03-9292 (2nd Cir. August 11, 2004). Defendant-school's regulation which allows for "release time" from public schools for religious instruction does not violate the Establishment Clause of the First Amendment.
http://caselaw.lp.findlaw.com/data2/circs/2nd/039292p.pdf

The Hartford Courant Co. v. Pellegrino, No. 03-9141 (2nd Cir. August 13, 2004). The public and press enjoy a qualified First Amendment right of access to docket sheets and the court administrators have the authority to grant access to those docket sheets if the documents were sealed solely in accordance with administrative orders.
http://caselaw.lp.findlaw.com/data2/circs/2nd/039141pv2.pdf

McCarthy v. Hawkins, No. 03-50608 (5th Cir. August 11, 2004). Defendant's motion to dismiss on grounds of state-sovereign immunity is dismissed where state officers, sued in their official capacities for prospective relief, are proper defendant's under Title II of the ADA and are not immune under the Eleventh Amendment.
http://caselaw.lp.findlaw.com/data2/circs/5th/0350608p.pdf

Indiana Land Co. v. City of Greenwood, No. 03-3662 (7th Cir. August 8, 2004). Plaintiff-developer's challenge to defendant's ordinance that requires a two-thirds vote to overturn a recommendation of its planning commission is dismissed where the ordinance did not violate plaintiff's due process or equal protection rights.
http://caselaw.lp.findlaw.com/data2/circs/7th/033662p.pdf

Prairie Band Potawatomi Nation v. Richards, No. 03-3218 (10th Cir. August 12, 2004). Defendant's state tax on fuel supplied to defendant-Indian tribe by a non-Indian distributor is invalidated where defendant's legitimate interest of raising revenue interferes with and is incompatible with strong tribal and federal interests against taxation.
http://laws.lp.findlaw.com/10th/033218.html

Firms shift health costs to workers

August 24, 2004

A new report analyzing medical costs offers slight comfort for employers. Medical premiums increased an average of 10.5% this year, down from 14% in 2003. Premiums are expected to climb another 10% in 2005, according to the Hay Group, which surveyed 1,000 companies.

The news wasn't as good on HMO and POS premiums, however. Historically, those health plans showed lower cost increases, but that pattern didn't hold true this year, as HMO premiums rose 14.75%, and POS premiums increased 13.25%, the report indicates.

Reasons for premium hikes include increasing payments to hospitals and doctors, improving medical technology, an aging workforce and declining health in Americans, the report finds.

Another disappointment: Employer costs for health benefits rose from 7.28% of payroll in 2000 to 8.75% this year, causing firms to shift more costs to workers.

Michael Carter, vice president in Hay Group's benefits practice, says, "Most companies simply cannot afford to pass these costs along to their customers. There is no one 'silver bullet' solution to contain medical costs, so companies must use multiple strategies. The longer companies wait to address the issue, the more painful it could be for them or their employees."

Some companies increased employee deductibles, co-payments, and the caps on employees' out-of-pocket expenses. The proportion of health plans with co-pays of $15 or more jumped from 47% in 2002 to 72% this year. Furthermore, 30% of plans have co-pays of $20 or more this year. Employees also are bearing more of the cost of pharmaceuticals. The typical formulary co-pay is $20 this year, up from $10 in 2002, while the typical non-formulary co-pay is $30, up from $15 in 2002.
www.benefitnews.com

Controversial cost controls back in style

August 19, 2004

Skyrocketing health costs are forcing health plans to turn to controversial cost control measures, according to a new study in the journal Health Affairs.

One resurfacing measure is prior authorization for certain services. The study notes that half of the health plan communities studied reintroduced prior authorization requirements after first eliminating them. For instance, Aetna eliminated such requirements in New Jersey for about 50 inpatient and outpatient services in its HMO and PPO products during 2000- 2001, but reinstated many during 2002-2003 after experiencing sharp increases in health care use. Excellus BlueCross BlueShield in Syracuse reinstated prior authorization requirements for specialist referrals after finding that referral rates increased markedly when these requirements were eliminated during 2002.

HMOs are being more careful with utilization

management approaches, though, after doctor and consumer backlashes in the 1990s over such things as cutting hospital stays by one day for new mothers.

Other containment measures include stricter length-of-stay reviews and payment cuts after a threshold has been met, but the study authors say it's too early to tell how much effect the measures will have, adding that government cost-control measures might prove better over time. Researchers conducted 260 interviews with HMO and hospital executives, employers and regulators in 12 nationally representative communities. www.benefitnews.com

Today's Word:

Wabbit *(Adjective)*

Pronunciation: ['wæ-bit]

Definition 1: (1) Tired, exhausted, pooped; (2) off-color.

Usage 1: You will have a difficult time finding this word in most dictionaries; however, it is carefully tucked away in the Oxford English Dictionary and the citations below for 1973 and 1985 are enough to keep it current. The OED doesn't give us any information about this word's family: is the comparative "wabbiter" or "more wabbit?" May we behave wabbitly after exhausting work? Dare we use the default noun "wabbitness?" We will leave all these to your discretion.

Today's Word:

Psephology *(Noun)*

Pronunciation: [se-'fah-lê-gee]

Definition 1: The study of political campaigns and elections, including voting trends that predict election results. It could also be used to refer to the conduct of elections and voting trends themselves.